FILE COPY

JAN 6 1944

CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

**October Term, 1943**

**Nos. 38 and 39**

COLGATE-PALMOLIVE-PEET COMPANY,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

## PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT THEREOF.

E. ENNALLS BERL,
*Attorney for Petitioner,*
Delaware Trust Building,
Wilmington, Delaware.

ALBERT C. WALL,
MASON TROWBRIDGE,
BLEVINS C. DUNKLIN,
EDWARD J. O'MARA,
*Of Counsel.*

IN THE

# Supreme Court of the United States

**October Term, 1943**

**Nos. 38 and 39**

| | |
|---|---|
| COLGATE-PALMOLIVE-PEET COMPANY, *Petitioner,* *vs.* UNITED STATES OF AMERICA. | **PETITION FOR REHEARING** |

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Colgate-Palmolive-Peet Company, respectfully prays for a rehearing of the above cases on these grounds.

1. That the facts with reference to the volume of domestically processed foreign oils named in Section 602½ of the Revenue Act of 1934 and of all other fats and oils on hand in the United States when that section was passed, and the facts with respect to total domestic production and consumption of fats and oils, show that there was then no occasion to protect domestic producers against such domestically processed foreign oils and no probability that Congress would have had any desire to extend the processing tax to them.

2. That the legislative history of Section 602½ shows that Congress was not concerned to avoid such tempo-

rary inequalities as might result from construction of its language according to its unqualified tenor.

3. That for those reasons and in view of the legislative history it is improbable rather than probable that Congress was concerned to tax such oils as are involved in this suit.

E. Ennalls Berl,
*Attorney for Petitioner,*
Delaware Trust Building,
Wilmington, Delaware.

Albert C. Wall,
Mason Trowbridge,
Blevins C. Dunklin,
Edward J. O'Mara,
*Of Counsel.*

---

## Certificate of Counsel.

I, Mason Trowbridge, Of Counsel for Petitioner above named, hereby certify that the foregoing petition for Rehearing is presented in good faith and not for delay.

Mason Trowbridge.

## MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING.

If petitioner reads correctly the opinion herein, the conclusion reached by the Court rests ultimately on the protective purpose of Section 602½ and the consideration that "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse."

The Court views as a "reasonable probability that Congress would wish to tax future processings." That "probability," if it be, must derive, of course, from the protective purpose of the tax and an intention that the tax should fall equally on all owners of these foreign oils.

The purpose was that stated by the Court:

> "But the legislative history cannot be read without reaching a conviction that the advantages which would result to American vegetable oil producers from the heavy tax on oils not produced in the continental United States played a leading part in promoting the legislation." (Opinion, p. 2.)

Whether or not it is "probable" that Congress wished to tax the first domestic processing after May 10, 1934 of oils already domestically processed before that date depends, aside from the matter of equal treatment, on whether such taxation could have been expected to result in any "advantages • • • to American vegetable oil producers" and producers of other American fats and oils; the tax was enacted to benefit all of them.

The following facts, existing at the time the statute was passed, show clearly that taxation of such oils could result in no advantages whatever to American fats and oils producers and that extension of the tax to such domestically processed foreign oils could accomplish nothing.

Figures filed with the Court by the Government, at the request of the Court made upon the argument, showed that

the amount of tax collected upon these domestically processed oils on hand on May 10, 1934 during the fiscal years 1935 and 1936 (*i. e.*, the first two years of collections after May 10, 1934), was estimated by the Treasury Department to have been approximately 12% of $52,148,172.04 which is $6,257,780.65. Assuming that this sum was collected entirely from oil subject to the 3¢ tax only (in fact some of the oil also paid the 2¢ surtax), that means that the amount of preprocessed oil on hand on May 10, 1934 was about 208,592,688 pounds.[1] Compilation of the figures in the reports of the Bureau of the Census on "Animal and Vegetable Fats and Oils—Production, Consumption, Imports, Exports and Stocks—Quarterly for Calendar Years 1931 to 1935" shows that there were on hand in this country on the dates shown the following amounts of fats and oils available for use, including the oil content of oil seeds, copra, etc., on hand at mills:

| *Date* | *Number of Pounds* |
|---|---|
| March 31, 1932 | 2,473,995,000 |
| March 31, 1933 | 2,532,661,000 |
| March 31, 1934 | 2,754,629,000 |

So the stocks of those domestically processed foreign oils constituted approximately 7½% of the total stocks of fats and oils in this country when Section 602½ was passed by Congress in May, 1934.

These same census reports show (figures compiled) that the annual consumption of fats and oils in this country exceeds the annual domestic production.

---

[1] The amount of such preprocessed oil on which a tax was paid after June 30, 1936 must have been negligible. It was 6% of the total paid by the petitioner, as appears from the Stipulations of Facts in the record.

| *Year* | *Domestic Production* | *Domestic Consumption* |
|---|---|---|
| 1932 | 6,239,665,000 | 6,664,505,000 |
| 1933 | 6,370,375,000 | 6,858,067,000 |
| 1934 | 6,090,373,000 | 7,325,580,000 |

This table not only shows an excess of domestic consumption over domestic production but also shows that the 208,000,000 pounds of preprocessed oils on hand on May 10, 1934 constituted in 1934 something less than 10 days' usage of fats and oils for the country.

This then was the situation in May 1934. These domestically processed foreign oils constituted only 7½% of the total supply of fats and oils then in the country. They amounted to only ten days' domestic usage of all fats and oils. There was not enough volume to retard the advance in prices of domestic fats and oils which Section 602½ was intended to bring about, even if it be assumed, contrary to the fact, that it was all held for sale.[1] At what price would the owners of these oils have offered them for sale? At the best price they could get. With domestic consumption exceeding domestic production they would not have had to underbid the domestic product in order to sell their holdings. They would have shared along with domestic producers in the expected advance in the general price level of untaxed oils. That is what would have happened if these domestically processed foreign oils had been held for sale. For the

[1] As a matter of fact only a part, and probably an inconsequential part, of the 208,000,000 pounds was held for sale. The petitioner itself owned and used in manufacture more than 39% of the 208,000,000 pounds (Stipulations of Facts). That leaves an amount of preprocessed oils in the hands of others than petitioner on May 10, 1934 which was only 4½% of the total stocks of fats and oils on hand in the country on that date, and amounted to one week's usage of fats and oils. And of course not all that was held for sale. The probability is that very little of it was so held. If petitioner was holding its stocks of preprocessed oils for its own further use in manufacture it is not to be doubted that other manufacturers were doing the same.

most part they were not held for sale and were no longer competing with the domestic products.

Petitioner is here making no speculative argument. Petitioner is testing the "probability that Congress would wish to tax future processings" of oils already domestically processed on May 10, 1934. We have pointed out that neither the wording of Section 602½ nor its derivation, nor the Congressional debates nor the Committee Reports, show that the word "first" was intended to be taken in the qualified sense of first after the effective date of the tax and we are met with the answer, *inter alia*, that Congress "*probably*" would have wished to tax future processings. We know of no way of testing the probabilities except by the facts which existed when the tax was enacted. If it be said that, so far as is disclosed, Congress was without knowledge of the facts with respect to those oils and their possible effect, if untaxed, upon the domestic market, we see no warrant for assuming that Congress struck out blindly to protect the domestic market against them. One cannot very well attribute to Congress a purpose to protect the American producer against those oils but complete ignorance as to their actual capacity to injure the American producer, which was nil.

In the absence of any shred of factual evidence that Congress was in any way concerned to tax oils already domestically processed we submit that such a concern can only be inferred if, at the time the tax was enacted, failure to tax such oils would have appeared likely to defeat in some degree the advantage intended to be conferred upon American producers of oils and fats. The fact is, as the figures show, that no one cognizant of the situation at that time could have entertained any such expectation.

The construing of a statute is an effort to find out what the legislature actually intended. It deals with realities. What *actually* did Congress have in mind, is the question

posed. The history of Section 602½ and the debates and Committee Reports answer clearly. What Congress *actually had in mind* was the restriction of future imports by the imposition upon the foreign oils of the same tax theretofore imposed upon domestic agricultural products with which they competed, which was a tax upon the earliest domestic processing. That is what is talked about in the debates. That is what Congress did. There is no hint in the debates or Committee Reports that in repeating the language of its then recently enacted Agricultural Adjustment Act Congress intended that language to mean something different from what it meant in the A. A. A. Why reason that the words "the first domestic processing" in A. A. A. meant earliest domestic processing only because otherwise there would have been double taxation when that is their normal meaning when unqualified, and why reason that in the absence of that particular compulsion the words are not to be given their normal meaning? An amendment to the section was passed in 1936 containing differently worded exemption clauses which are explicable if the petitioner's interpretation of the section is correct; but inexplicable if the Treasury Department's interpretation is correct, except by viewing the difference as an inadvertence.

Those are the realities of this case.

Neither the legislative history of Section 602½ nor the facts spell out any "probability that Congress would wish to tax future processings" of these foreign oils already domestically processed on May 10, 1934. A different conclusion might be drawn from the figures, standing alone, with respect to the amount of tax collected on such oil. Those were the figures requested by the Court and were the only figures before it other than those relating to petitioner's own usage. But when those figures are compared with figures of total stocks on hand and total domestic production and consump-

tion it is plain that there was no reason to fear any adverse effect upon the American farmer from the relatively small volume of foreign oils which had been domestically processed before May 10, 1934.

The Court is "not convinced that the difference in language [of the two exemption clauses in the 1936 Amendment] was meant to evidence a difference in meaning" and is of the opinion that "The careful provision requiring payments of applicable import taxes under all conditions tends to the contrary conclusion." It would seem to petitioner that the care shown in the framing of the latter provision would tend to show that the other provisions of the exemption clauses were worded with equal care and that Congress did intend to create the actual distinction which the difference in language clearly indicates.

With reference to equality of taxation, on page 3 of the opinion the Court says:

> "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse. Yet the omission by Congress of a tax upon the first processing which followed the enactment of the Act would give users of the oils who had treated them prior to the Act a definite advantage over their competitors who had not done so."

But there still remains the question whether there is to be attributed to Congress a desire in this instance to avoid the particular temporary inequality which the Court points out and whether such a desire can be attributed to it with sufficient certainty to warrant, in the face of the legislative history and the unqualified language of Section 602½, the construction which the Treasury Department has put upon the section. Again petitioner points to that history:

When by amendment of the original bill imported whale oil, imported fish oil and imported marine-animal oil were

deleted from the section imposing a processing tax and made subject to a duty of 3¢ a pound instead of a 3¢ processing tax, Congress certainly evinced no concern over the similar inequality which that produced though it gave an advantage not merely to the owners of domestically processed fish, whale and marine-animal oils but likewise to the owners of crude fish, whale and marine-animal oils, on hand on May 10, 1934. What reason is there to suppose Congress was any more concerned over other preprocessed oils?

The House Ways and Means Committee was specifically urged to supplement the processing tax in Section 602½ with a floor stocks tax. There was a floor stocks tax in the A. A. A. from which statute the instant tax was borrowed. A floor stocks tax would not only have obviated the inequality which the Court points out but other inequalities consequent upon the imposition of the processing tax however it be construed. We refer to the advantage possessed by those manufacturers who on May 10, 1934 had in stock finished articles or articles in process of manufacture into the making of which these oils entered, but in the making of which they lost their identity as oils so that the oil processing tax could not be collected with respect to them however interpreted. But the Committee did not include a floor stocks tax in the bill. It was not concerned over any temporary inequalities.

One must attribute to the Ways and Means Committee either an intention to tax these preprocessed oils or an intention not to tax them. To attribute to the Committee an intention to tax them, means that the Commitee instead of providing clearly for their taxation by a floor stocks tax left the effectuation of its intention to the hazards of interpretation, relying upon the Treasury Department to apprehend that taxing language copied from the Agricultural Adjustment Act was to be given a different meaning in Section 602½.

Congress intended to tax the products subject to the A. A. A. whether previously processed or not and so declared; the processing tax was supplemented by a floor stocks tax. Congress did not declare any such purpose when it enacted Section 602½.

> "If Congress, however, had the purpose assigned by the commissioner, it should have declared it; when it had that purpose it did declare it." (*Shwab* v. *Doyle*, 258 U. S. 529, 536.)

The Government contends that "first" means "next." Petitioner submits that the actual and abundant evidence is to the contrary.

Respectfully submitted,

E. Ennalls Berl,
*Attorney for Petitioner,*
Delaware Trust Building,
Wilmington, Delaware.

Albert C. Wall,
Mason Trowbridge,
Blevins C. Dunklin,
Edward J. O'Mara,
*Of Counsel.*

P. 4.

# SUPREME COURT OF THE UNITED STATES.

Nos. 38 and 39.—October Term, 1943.

| | | |
|---|---|---|
| 38 | Colgate-Palmolive-Peet Company, Petitioner, *vs.* The United States of America. | On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit. |
| 39 | Colgate-Palmolive-Peet Company, Petitioner, *vs.* The United States of America. | |

[December 13, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

These two writs of certiorari were granted to review a judgment of the Circuit Court of Appeals for the Third Circuit denying recovery to the petitioner of taxes paid to the United States aggregating $2,532,643.16. The issues in the two cases are identical. Each case covers a separate period of time.

The suits were brought in the United States District of Delaware under Judicial Code § 24(20). Recovery was there also denied. We granted certiorari because of a conflict of decisions. 319 U. S. 778. See *Harrison, Collector* v. *Durkee Famous Foods, Inc.*, 136 F. 2d 303; *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. 2d 438; *Tasty Baking Co.* v. *United States*, 38 F. Supp. 844; *Cincinnati Soap Co.* v. *United States*, 22 F. Supp. 141.

The issue is narrow and may be simply stated. In the Revenue Act of 1934, § 602½, 48 Stat. 763, an excise tax was levied on the "first domestic processing" of certain foreign oils—coconut, sesame, palm, et cetera.[1] When the act was approved on May

[1] 48 Stat. 763, Sec. 602½ Processing Tax on Certain Oils.

"(a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernal oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. . . . For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

10, 1934, this petitioner had on hand large quantities of these oils which had gone through one or more domestic processings. After the effective date, all of this oil was subjected to further processing upon which petitioner paid a tax, recovery of which is here sought. The taxpayer urges that the taxable event fixed by the statute is the first domestic processing, without regard to when it occurs. The phrase is defined by the statute as "the first use in the United States . . . of the article" taxed. Since the effective date of the Act is May 10, 1934, the taxpayer concludes that if the first use in this country occurs after that date, it is a taxable event, and if it occurs before May 10, 1934, it is not a taxable event. The Government reads the Act differently. To it, the Act imposes a tax on the first domestic processing after the effective date of the Act, regardless of the prior domestic processing. The litigants agree that the section is not retroactive. The facts are not in dispute.

The section in question does not make clear whether the "first domestic processing" is the first which takes place in this country or the first after the passage of the Act. The definition in § 602½ does not aid the interpretation. "First use" may be first after importation or first after the Act. The likelihood that tax statutes look to the future and not the past indicates that processings after the effective date were meant to be taxed. Cf. *Hassett* v. *Welch*, 303 U. S. 303; *Shwab* v. *Doyle*, 258 U. S. 529. This likelihood does not depend upon any taxation of a past event but upon the reasonable probability that Congress would wish to tax future processings. The insertion of the qualifying adjective "first" was probably due to a desire to avoid accumulative taxes on successive processings. Treas. Reg. 48, Art. 1, as amended by T. D. 4695.

An examination of the general Congressional purposes intended to be served by the Act will further aid in the resolution of this dispute. This tax has been held by this Court to be a valid exercise of the taxing power. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 312. But the legislative history cannot be read without reaching a conviction that the advantages which would result to American vegetable oil producers from the heavy tax on oils not produced in the continental United States played a leading part in promoting the legislation.[2] *Id.*, 320. The tax yielded sub-

[2] 78 Cong. Rec. 2785, 2793, 2930, 3007, 6311-16, 6380-95, 7246, 7976.

stantial revenues, which were remitted to the Philippine Government, since the Philippines were the source of many of the products taxed.

A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse. Yet the omission by Congress of a tax upon the first processing which followed the enactment of the Act would give users of the oils who had treated them prior to the Act a definite advantage over their competitors who had not done so. The advantage would be slight if Congress had supposed the tax would finally be borne by the consumer rather than by the manufacturer, but here the purpose was to restrict the domestic market for imported oils, and Congress probably would not intend that manufacturers should find a market for the foreign oil at a price enhanced by the full amount of the tax. Again, if petitioner's argument is sound, the Congressional purpose to create an advantage for domestic oil producers would be frustrated to the extent that tax free foreign oils on hand could continue to compete with the domestic product. A major purpose of the legislation would be temporarily defeated in part by freeing from the tax oil which had received one domestic processing.

The Treasury promptly interpreted the Act to apply to all first processings after its effective date. Treas. Reg. 48, Art 1(1), August 17, 1934. This action of the Treasury, with its wide experience in tax matters, has weight in our conclusion, notwithstanding the prompt challenge of the taxpayer and others similarly situated. *United States* v. *American Trucking Ass'n's*, 310 U. S. 534, 549.

In reaching the conclusion that the "first domestic processing" is the first after the passage of the Act, we do not disregard some circumstances vigorously pressed upon us by petitioner which give color to the opposite interpretation. The taxpayer points to the fact that the phrase "first domestic processing" was used earlier in § 9(a) of the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31, 35, which levied a similar processing tax upon the first domestic processing of the basic agricultural commodities—wheat, cotton, corn, hogs, rice, tobacco and milk—and that, at the time this tax was placed on foreign oils, a regulation of the Commissioner of Internal Revenue was in effect which interpreted the phrase as being the first domestic processing whenever it oc-

curred and therefore as relieving a processor of the tax when the first domestic processing took place prior to the effective date of the A. A. A. Treas. Reg. 81, as amended, T. D. 4403, November 2, 1933.

The answer to this argument arises from the difference between the two acts as to the taxation of floor stocks. Under the A. A. A. commodities which had undergone their first domestic processing prior to the passage of the Act bore a corresponding floor stock tax. 48 Stat. 40, § 16. A subsequent processing tax would have created double taxation and an inequality among taxpayers which the compensating floor stock tax had obviated. The exemption of subsequent domestic processing by the Treasury Regulations was thus compelled by the Act itself. Cf. Treas. Reg. 82, Floor Stocks under the A. A. A. No such provision appears in the Revenue Act of 1934 or any later legislation supplementing § 602½. Phrases without definite legal connotation which are alike take their meaning from their context. The "first domestic processing" of the A. A. A. naturally refers to the first in point of time to avoid double taxation, while the same words in this Act just as naturally refer to the first after the Act to avoid inequalities. Double taxation does not arise from the later Act.

For a further point, petitioner calls attention to the action of Congress in amending § 602½ in the Revenue Act of 1936, 49 Stat. 1742, by adding fatty acids and salts derived from the taxed oils with the proviso that the tax should not apply:

"(1) with respect to any fatty acid or salt resulting from *a previous first domestic processing taxed under this section* or upon which an import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, or (2) with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been *a previous first domestic processing* or upon which an import tax has been paid under such section 601(c)(8)."

This amendment came from the Conference Committee without comment. H. Rep. No. 3068, 74th Cong., 2d Sess., p. 17. Its origin was in the Senate. The purpose of the exemption was said to be "to avoid double taxation." S. Rep. No. 2156, 74th Cong., 2d Sess., Title V. Petitioner's contention is . . . that the Conference Committee wrote into the amendment two different clauses, one of them . . . creating an exemption of mixtures and combinations conditioned upon a 'previous first domes-

tic processing' and the other creating an exemption of fatty acids and salts conditioned upon their 'resulting from a previous first domestic processing *taxed under this section.*'" Therefore Congress is said by petitioner to have recognized two classes of first domestic processings; one taxed under the section, the other not taxed. In the absence of some expression of such intention, however, beyond the words quoted, we are not convinced that the difference in language was meant to evidence a difference in meaning. Cf. *Haggan Co.* v. *Helvering*, 308 U. S. 389, 400. The careful provision requiring payments of applicable import taxes under all conditions tends to the contrary conclusion. We think the purpose of the 1936 amendment was to add new taxable articles and to make plain the purpose to free them from double taxation. If the articles are not exempt from the 3 cent excise because of foreign processing, we see no reason to exempt them because of domestic processing prior to the Act.

Finally we consider petitioner's argument that House Report (Conference) No. 1385, 73d. Cong., 2d Sess., p. 30, manifests the intention of Congress to tax only the "first domestic processing" which occurs after the Act when there has been no previous domestic processing prior to the Act. This report deals with the Revenue Act of 1934. The Senate amended the section of the House bill which taxed foreign oils by the addition of other foreign vegetable oils and marine oils. The Conference accepted the amendment in regard to the marine oils but changed "the point of imposition of the tax in the case of imported whale oil, imported fish oil and imported marine animal oil to the importation instead of the first domestic processing." These were all the marine oils in the Senate amendment.

By the Conference amendment these marine oils were placed in an entirely different section, 602, of the Revenue Act of 1934. It amended 601(c), Revenue Act of 1932, which imposed an excise tax on the domestic producer or the importer of lubricating oils, grain extracts, petroleum, coal, lumber, et cetera, by adding these marine oils to the taxable articles.[3] Regulations treated

[3] 48 Stat. 762, Sec. 602. Tax on Certain Oils.

"Section 601(c) of the Revenue Act of 1932 is amended by adding at the end thereof a new paragraph as follows:

"'(8) Whale oil (except sperm oil), fish oil (except cod oil, cod-liver oil, and halibut-liver oil), marine animal oil, and any combination or mixture containing a substantial quantity of any one or more of such oils, 3 cents per pound. The tax on the articles described in this paragraph shall apply only

marine oils upon the same basis as the other taxed imports in the section.[4] Consequently marine oils imported prior to the Revenue Act of 1934 escaped taxation when eventually processed. This inequality of treatment, under the Government theory, between importations of vegetable oils and importations of marine oils indicates, says the petitioner, that the Government is wrong and Congress intended to tax processing only when a prior domestic processing either before or after the Act had not occurred. The Conference change, says petitioner, "was merely a shift of the tax on these particular oils from the first processing after the entry (the point of imposition under Section 602½) to the entry itself." But though Congress may have been willing to defer protection of American producers from marine oils, it nowhere indicated that handlers of other oils already processed should obtain a trade advantage through exemption.

We are confronted with an ambiguity of phrase which yields to the intent of Congress as disclosed by the legislative history. In such circumstances, we follow the general purpose of the Act to promote the interests of domestic oil producers through an excise tax.

*Affirmed.*

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

---

with respect to the importation of such articles after the date of the enactment of the Revenue Act of 1934, and shall not be subject to the provisions of subsection (b)(4) of this section (prohibiting drawback) or section 629 (relating to expiration of taxes).' "

[4] Treasury Department Bureau of Customs Circular Letter, No. 1202, May 11, 1934; T. D. 45751; T. D. 47448.